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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 130

S. W. ASHER,
Petitioner,

v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1968

No. 1409

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v.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions of the Indiana Supreme Court have been reported: Asher v. State, 244 N.E. 2d 89 (1969).

JURISDICTIONAL STATEMENT

Respondent concurs in the jurisdictional statement set forth in the petition for writ of certiorari.

QUESTION PRESENTED

Whether petitioner's conviction for armed robbery, when based upon the testimony of his co-robber which was cor-

roborated by a disinterested witness to the division of the loot, violated petitioner's right to procedural due process of law guaranteed by Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent concurs in the statement of Constitutional Provisions Involved set forth in the petition for writ of certiorari, with this addition: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,* and to have the Assistance of Counsel for his defence." Sixth Amendment, Constitution of the United States (emphasis added).

STATEMENT OF THE CASE

Shortly after 11 p.m. on April 26, 1964, two armed men held up a Burger Chef restaurant in Indianapolis, Indiana (Tr. 154-63, 176-79, 193-98). Shortly thereafter, about 12:30 a.m., an Indianapolis police detective arrested a man named Ralph Brown and an 18-year-old boy named Donnie Richey, who were together on Virginia Avenue, because Brown matched a broadcast description of one of the robbers given by the Burger Chef employees to the police (Tr. 253-55). Brown voluntarily returned (Tr. 295-96) to Burger Chef, where three employees identified him as one of the holdup men (Tr. 163, 175, 199-200, 366-67). Brown was then arrested and taken to police headquarters (Tr. 366-67). There Brown said he was an escapee from Michigan State Prison, admitted the robbery, and implicated petitioner (Tr. 368).

On April 29, 1964, petitioner was arrested, a signed statement implicating petitioner was taken from Brown, and this statement was read to both men while in each other's presence (Tr. 369-71).

Brown, worried by a possible life sentence as a Habitual Criminal, pled guilty and received a ten-year sentence (Tr. 273, 299-300). At petitioner's trial following his not-guilty plea, Brown testified at length concerning petitioner's participation in the holdup (Tr. 274-95). According to Brown, petitioner formulated the robbery scheme (Tr. 275), selected the victim (Tr. 280, 309-15), drove the get-away vehicle (Tr. 288-293), and shared in the robbery proceeds at Brown's apartment on Virginia Avenue (Tr. 294-95).

Donnie Richey testified. In addition to corroborating the testimony about Brown's apprehension, identification, and arrest (Tr. 214-16), Richey testified that he was in Brown's Virginia Avenue apartment at the time of the robbery (Tr. 209). About midnight, that is, about a half-hour after the robbery, Brown returned; ten minutes later Richey admitted petitioner, who said "he wanted to see Brown," to the apartment (Tr. 212). Then, Richey testified, the petitioner, Brown, and a third man went into the next room: "The three of them, Sam [petitioner], Willoughby and Brown were in the bedroom. While I listened to the radio I could hear the sound of change. It sounded like there was a lot. By change I mean money. They were in the bedroom fifteen minutes, and then Asher [petitioner] and Willoughby left." (Tr. 213-14).

The jury convicted petitioner and he was sentenced to go to jail. Petitioner appealed, stating in his reply brief filed with the Indiana Supreme Court that "the Appellant's sole argument in this case is that no reasonable man could have found the Appellant guilty on the

evidence submitted to the Jury." (p. 1). Petitioner lost his appeal, *Asher v. State*, 244 N.E. 2d 89 (1969). Petitioner now seeks a writ of certiorari from this Court, apparently under the impression that his conviction resulted from the wholly-uncorroborated testimony of his accomplice, according to his petition (p. 2). Petitioner further argues, and this for the first time at any stage of the proceedings, that a conviction so obtained violates petitioner's right to procedural due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT AGAINST GRANTING THE WRIT

I.

Petitioner's conviction was not the result of the wholly-uncorroborated testimony of his accomplice, and therefore the question presented in the petition for writ of certiorari is unripe for review by this Court.

This part of respondent's argument is directed to the facts which appear in the record. Petitioner's framing of the "question presented" assumes that he was convicted on the wholly-uncorroborated testimony of his accomplice, Ralph Brown. As the numerous references to Richey's corroborative testimony in respondent's statement of the case demonstrate, this assumption is incorrect. Moreover, Petitioner stated in his reply brief before the Indiana Supreme Court: "Appellant in his brief conceded that as a general rule the defendant may be convicted on the uncorroborated testimony of his accomplice, (Appellant's Brief, pages 146 and 147) and that there was some minor corroboration of the accomplice, Ralph Brown, by Ralph Brown's teen-age boyfriend, Donnie Richey. (Appellant's Brief, page 139)." [Parends in the original].

Richey's testimony corroborates petitioner's accomplice, Brown, in two important respects: 1. Richey's testi-

mony, like Brown's, also places petitioner in Brown's apartment about one-half hour after the robbery occurred. 2. Richey testified that after he admitted the petitioner to Brown's apartment, the petitioner, Brown, and a third man went into the bedroom, where Richey overheard them dividing the proceeds of the robbery. This is in substantial accord with the account of the event given at the trial by the accomplice, Brown. This is why petitioner cannot now argue that his conviction resulted from the wholly-uncorroborated testimony of petitioner's accomplice. Further, this corroborative testimony demonstrates why the issue — whether a criminal conviction based upon the wholly-uncorroborated testimony of the defendant's accomplice violates the defendant's procedural due-process-of-law guarantees under the Fourteenth Amendment to the Constitution of the United States — is particularly unripe for review by this Court under the facts of this particular case.

II.

Petitioner may not raise in this Court, for the first time in these proceedings, an issue of procedural due process under the Fourteenth Amendment to the Constitution of the United States when there was ample opportunity for petitioner to raise the issue in the state courts below.

An examination of the petition for writ of certiorari in this case discloses a departure from the requirements of U. S. Sup. Ct. Rule 23 (f), 28 U.S.C., which provides:

> If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such

> pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The reason why petitioner's statement of the case in his petition does not specify: (1) the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, and (2) the way in which they were passed upon by the court, so as to give this court jurisdiction to review the judgment on writ of certiorari, is because these events never took place.

Subsequent to his conviction, petitioner filed a seven-point motion for new trial, see 244 N.E. 2d 93; nowhere did the motion mention petitioner's Federal Constitutional guarantees or their violation by the manner in which petitioner's guilt was eventually determined. More important, the question of petitioner's guilt was briefed and argued in the Indiana Supreme Court in the apparel of a sufficiency-of-evidence question, not the full-blown panoply of a deprivation of procedural due process of law guaranteed by the Constitution of the United States. Even the lone dissent favoring petitioner below, 244 N.E. 2d 89, 93, gave no indication that a federal question was either presented, argued, or considered. As pointed out earlier, petitioner himself told the Indiana Supreme Court: "The Appellant's sole argument in this case is that no reasonable man could have found the Appellant guilty on the evidence submitted to the Jury." (Appellant's reply brief, p. 1.).

The most succinct response to a record in this state of disarray is Mr. Justice Harlan's, writing for this Court in

Ellis v. Dixon, 349 U.S. 458, 460 (1954): "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here." *Cf. Brown v. Allen*, 344 U.S. 443, 480 (1952).

Last, petitioner's failure to raise the issue below makes it difficult to utilize the prime consideration for issuing a writ of certiorari recommended by U. S. Sup. Ct. Rule 19.1(a), 28 U.S.C.: "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." The two Indiana courts below which considered petitioner's cause neither decided nor declined to decide his Federal Constitutional claim—it was never presented to them, though petitioner was represented by counsel throughout.

III.

This Court has already upheld, by implication, the principle that a criminal conviction based upon an accomplice's testimony does not violate the defendant's Federal due process guarantees if surrounded by proper procedural safeguards for their protection.

The possible Constitutional problems posed by a state's use of an uncorroborated accomplice's testimony to obtain a criminal conviction have been before this Court before. This was the fact situation posed by *Cash v. Culver*, 358 U.S. 633 (1959). Petitioner had been convicted of burglary in a Florida state court on the basis of an uncorroborated accomplice's testimony. On petitioner's appeal from an unsuccessful habeas corpus proceeding, this Court held that the deprivation of due process occurred not in the method by which the conviction was obtained, but rather in the fact that petitioner was without counsel. After noting that the petitioner was left to conduct his own defense, Mr. Justice Stewart wrote: "It is not clear what, if any, objections

were made to Allen's [the accomplice's] testimony, or whether he was cross-examined. . . . The Florida decisions also establish the right to cross-examine an accomplice witness as to whether he is testifying under an agreement for leniency, and even as to whether he believes that his testimony will be in his best interest. [citations omitted] A layman would hardly be familiar with these rights." 358 U.S. 633, 636-38. *Cf. Napue v. Illinois,* 360 U.S. 264 (1959).

The lack of procedural safeguards surrounding the use of an accomplice's testimony, which disturbed this Court in *Cash v. Culver, supra,* are not present in the instant case. First, this petitioner was represented by counsel throughout. But more important, the very safeguard urged by Mr. Justice Stewart was respected here: The petitioner's accomplice, Brown, was asked on cross-examination whether he was testifying under an agreement for leniency, and Brown replied, "I did not make any deal with the Prosecutor to testify against Willoughby or Asher [petitioner]" (Tr. 299-300). And not only once; later in his cross-examination, Brown testified, "They never made no deal. They never told me what to say." (Tr. 353).

Finally, any objection to the use of accomplice testimony on the basis of a historical perspective of the common law as it existed when the Bill of Rights was enacted, as is suggested by petitioner's statement of the question presented, was swept away by this Court's opinion in *Washington v. Texas,* 388 U.S. 14 (1967). The analysis revolves around the incorporation of the Sixth Amendment's guarantees (not the Fifth Amendment, as petitioner states) into the due-process-of-law guarantees of the Fourteenth Amendment.

The issue in *Washington v. Texas, supra,* was whether a defendant in a state criminal proceeding could *compel* the favorable testimony of an accomplice witness, notwith-

standing two state statutes forbidding such testimony. Mr. Chief Justice Warren, writing for a unanimous Court, held the defendant had this right. The Court's opinion first noted that the common-law prohibition against the use of accomplice testimony in the lower Federal Courts, as a matter of the administration of Federal criminal justice, had been abolished by the Court long ago, citing *Rosen v. United States,* 245 U.S. 467 (1918). The Chief Justice then reasoned on to a two-point conclusion: First, the *Rosen* holding really rested upon the Sixth Amendment's right to obtain witnesses in one's favor; second, that this right was available to a state criminal defendant, state statutes to the contrary notwithstanding, by virtue of its incorporation into the Due Process Clause of the Fourteenth Amendment. Mr. Justice Harlan concurred in the result on the theory that "In my view the Due Process Clause is not reducible to 'a series of isolated points,' but is rather 'a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . .' [citations omitted]." 388 U.S. 14, 24.

The Sixth Amendment also gives a defendant "the right * * * to be confronted with the witnesses against him. . . ." If it is true that defendant may *compel* the favorable testimony of accomplice witnesses, *Washington v. Texas, supra,* then he should confront the unfavorable accomplice witness's testimony against him, for the reason quoted by Mr. Chief Justice Warren in *Washington v. Texas, supra*: "'[T]he truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . .' *Rosen v. United States,* 245 U.S. 467, 471." 388 U.S. 14, 22. This result would allow respondent to retain what Mr. Justice Cardozo vouchsafed it in another context many years ago: "A

reciprocal privilege, subject at all times to the discretion of the presiding judge [citation omitted] has now been granted to the state. There is here no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before." *Palko v. Connecticut,* 302 U.S. 319, 328 (1937).

CONCLUSION

Wherefore Respondent prays that the petition for writ of certiorari to the Supreme Court of Indiana be denied.

Respectfully submitted,

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